United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1052

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To be argued by
HAROLD DUBLIRER

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

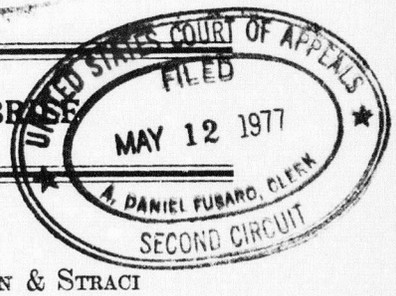
Appellee,

against

VINCENT DiNAPOLI,

Appellant.

On Appeal from the United States District Court for the Eastern District of New York



APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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APPELLANT'S REPLY BRIEF

The Government's brief takes a draconian approach which is at odds with the concept of a fair trial.

I

We argued in our main brief (pp. 11-13) that the trial judge should have permitted appellant to recall Montello or exercised discretion under Fed. R. Evi. 613(b) to dispense with the foundation requirement in the interest of justice. The Government contends that neither argument has merit.

First, the Government contends (brief p. 7) that appellant "incorrectly assumes that the trial judge did forbid the recall of Montello".

The Government does not deny that appellant thrice requested the recall of Montello; the trial judge never granted the application. The Government admits (brief p. 7) that "the whereabouts of the witness (who was being protected under the Witness Protection Program)" were not disclosed; appellant could not subpoena him. The Government admits (brief p. 7) that "the prosecutor had voluntarily agreed to produce the witness"; nevertheless, the witness was not produced.

The ultimate fact is that Montello never got back on the witness stand. The Government's brief does not say what kept him off. We suggest that it was because everyone understood that the trial judge had refused permission to recall him.

Second, the Government contends (brief p. 7) that "even if the court's ruling had been to prohibit the recall of Montello such a ruling would not have been an abuse of discretion" because appellant's counsel "had no excuse for his failure to question the witness on the first opportunity" (brief p. 8).

Assuming that this is so, was there no *locus poenitentiae* for appellant's counsel? This was a criminal trial; a man's freedom was at stake. The trial was still in progress when appellant's counsel asked for Montello's recall. No one raised objection based on the danger of prejudice, confusion or delay. Fed. R. Evi. 403. The prosecutor had consented. Given the importance of the bias testimony to the defense, appellant was denied a fair trial when his efforts to adduce such testimony were blocked at every turn.

II

The Government's brief (p. 10) argues that a certificate of relief from disabilities, issued pursuant to New York Correction Law §702, did not satisfy the require-

ment of Fed. R. Evi. 609(c). Here, again, the Government adopts a strict construction and does not attempt to equate its contention with the standard of Fed. R. Evi. 102. The latter rule is nowhere mentioned in the Government's brief.

The contention advanced in appellant's main brief (p. 15)—that the trial court's ruling was unduly restrictive of the intention of Fed. R. Evi. 609(c)—finds support in *United States* v. *Thorn,* 547 F.2d 56 (8 Cir. 1976). There the Court of Appeals upheld a trial court's ruling that a witness had been rehabilitated even though the rehabilitation "was not evidenced by a certificate of any nature", saying (547 F.2d at p. 59):

> ". . . We think it a purpose of this and other rules to permit exercise of discretion by the trial court in implementing the purpose of the rules 'to the end that truth may be ascertained and proceedings justly determined'. Rule 102, Federal Rules of Evidence."

The trial court's ruling prevented appellant from testifying in his own defense; it also prevented him from calling character witnesses. See *United States* v. *Edwards,* 549 F.2d 362, 366-367 (5 Cir. 1977).

III

As to the issue of delay in prosecution, there was no on-going current investigation which would have been compromised by the filing of this indictment and which required that the indictment be sealed. Montello had been in jail for several years. His "cooperation" with the authorities concerned bygone events.

Finally, we call to the Court's attention that the subject of delay in prosecution is now being considered by the United States Supreme Court in *United States* v. *Lovasco,*

No. 75-1844 (reported below in 532 F. 2d 59, cert. granted 97 S. Ct. 233, 50 L. Ed. 2d 164) which was argued on March 22, 1977 but has not yet been decided.

CONCLUSION

The judgment of conviction should be reversed.

Dated: May 10, 1977

Respectfully submitted,

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HAROLD DUBLIRER
Of Counsel

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